Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	
	)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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December 1, 2000

SUMMARY

Disparate regulatory treatment based upon Commission application of arcane regulations ill-equipped to address network convergence, and adaptations of networks to broadband deployments, must end. The Commission needs to adopt a different regulatory paradigm. Regulatory parity of functionally equivalent services delivered over different technological platforms and infrastructures must guide its decision-making. Competitive markets should be unregulated.

The Commission should expedite resolution of USTA's Petition for Declaratory Ruling. Consistent with USTA's support for regulatory parity, the Petition requests that the Commission require, as it must pursuant to Section 254(d) of the Act, that cable operators who provide telecommunications services, including cable modem Internet transport, contribute to the universal service fund.

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INTRODUCTION

The United States Telecom Association hereby files its comments in response to the Commission's *Notice of Inquiry* ("NOI")[1] in the above-referenced proceeding. Also at issue is USTA's Petition for Declaratory Ruling (the "Petition") requesting that the Commission issue a ruling that cable operators or their affiliates that provide telecommunications services contribute to the universal service fund consistent with Section 254(d) of the Communications Act (the "Act") and Commission regulations. The Commission has instructed interested parties to comment on the Petition in this docket.[2]

Clearly, there is no dispute that: (1) rapid deployment of high-speed, advanced telecommunications networks and services is in the public interest; (2) the information technology marketplace is highly competitive with market forces fueling consumer and business demands for expanded bandwidth capacity for data and Internet services; and (3)

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1 *Notice of Inquiry* released September 28, 2000.

2 *Public Notice* DA 00-2329, released October 12, 2000.

regulatory forbearance must drive the deployment of advanced telecommunications networks. Enforcement of asymmetrical, industry-specific, regulations only hampers competition and access to Internet services. The need for regulatory parity for carriers providing functionally equivalent services over different technological platforms systems - - not enforcement of arcane regulatory distinctions - - is needed to ensure non discriminatory access to Internet transport and content to companies that deliver such services to consumers.

The Commission should also apply the necessary and impair analysis of the Supreme Court in *AT&T v. Iowa*. Adherence by the Commission to the Court's opinion would eliminate unbundling of DSL and line sharing because neither is required to ensure broadband Internet access competition. Moreover, expedited approval of BOC LATA boundary relief is imperative for the delivery of fully competitive broadband services.

Where the Commission defines services that fall within the definition of telecommunications services subject to Title II regulation, carriers providing such services must contribute to the universal service fund regardless of how such carriers, or their other service offerings, may otherwise be regulated.

I. LEGAL AND POLICY QUESTIONS

A. Litigation

A number of courts have considered, or are now considering, issues that involve the regulatory classification of the services by which users access the Internet through broadband data services offered by cable operators using cable modems and cable systems. In examining how such transmission and Internet services should be regulated, courts consider the Act's definition of various types of services, Commission precedents

and pre-existing, asymmetrical, industry specific regulations under the Act. In particular, litigation has repeatedly occurred over whether a cable-based broadband transmission or Internet service is a "telecommunications service," "information service," or "cable service" as defined in the Act, since distinct legal characteristics accompany each of these definitions under the Act. The applicability to cable operators of non-discriminatory access requirements for non-affiliated Internet service providers ("ISPs") and content providers is an on-going focus of such litigation. What these diverse court decisions reflect is the need for the Commission to exert leadership pursuant to the Act by adopting a regulatory paradigm in which functionally equivalent services receive symmetrical regulatory treatment regardless of the technological platform over which these services are delivered.

The Ninth Circuit Court of Appeals has provided important guidance on this topic by finding, after a detailed analysis, that the cable broadband transmission service offered by cable operators over cable systems is a telecommunications service subject to common carrier regulation. *See AT&T Corporation v. Portland*, 216 F3d 871 (9th Cir. 2000) ("*City of Portland*"). This finding was central to the Ninth Circuit's holding in *City of Portland* that the Act prohibits a local cable franchising authority from imposing regulations on a cable operator's broadband Internet access service. In addition, the Ninth Circuit found that the activities of ISPs, including the provisions of content, are information services.

City of Portland, which focuses on the powers of local cable franchising authorities under the Act, addresses different issues from that considered in *Gulf Power Company v. FCC*, 208 F.3d 1263, (11th Cir. 2000)(*"Gulf Power"*), *petition for cert. filed,*

National Cable Television Association v. Gulf Power Company, (US November 22, 2000). There, the Eleventh Circuit considered the Commission's pole attachment regulations. The court found that "Internet service" – as opposed to broadband transmission service – is not a telecommunications service under the Act. In *Gulf Power*, the Eleventh Circuit implied that cable modem service, to the extent that it is "Internet service," is an information service rather than a telecommunication service or cable service.

Currently pending before the Fourth Circuit Court of Appeals is another attempt to define the regulations applicable to Internet access over cable modems. *MediaOne v. County of Henrico (VA)*, Case No. 00-1680 (4th Cir. 2000), *awaiting decision.* There, the Fourth Circuit is considering an appeal from a federal district court which, in a decision entered prior to *City of Portland*, concluded that Internet access over cable modems is a cable service. *See MediaOne v. County of Henrico (VA)*, 97, F. Supp. 2d 712 (E.D. Va 2000), *appeal pending*. On appeal, GTE, Bell Atlantic, and Henrico County, VA are challenging the decision of the federal district court that cable modem Internet access is a cable service under federal and state law and that the county lacked the authority to impose open access obligations on MediaOne.

In *Comcast v. Broward County, Florida*, No. 99-6934, 2000 U.S. Dist. LEXIS 16485 (S.D. FL. November 8, 2000), the federal district court considered whether the Broward County ordinance could legally require Comcast to open its cable facilities to provide non-discriminatory access to non-affiliated ISPs. The court concluded that the "Broward County ordinance operates to impose a significant constraint and economic burden directly on a cable operator's means and methodology of expression .... The

ordinance has no application to wireless, satellite, or telephone transmissions or other providers of Internet service." *Id.* In finding that the Broward County ordinance violated the First Amendment, the court held: "Under the First Amendment, government should not interfere with the process by which preferences for information evolve. Not only the message, but also the messenger receives constitutional protection." *Id.*

What this array of judicial decisions indicates is that, without a coherent and clearly articulated Commission policy towards broadband transmission and access to Internet content, courts must apply the Communications Act on an *ad hoc* basis, without significant guidance from the Commission – the expert agency charged with implementing the Act.

B. Public Policy

The Commission's recent report on deployment of advanced telecommunications services concluded that deployment has been reasonable and timely. *Deployment of Advanced Telecommunications Capability: Second Report,* released August 2000. Although the Commission concluded that it would undertake a number of efforts to speed deployment of advanced telecommunications to all communities, its proposed efforts did not include market-based competition among Internet access transport and content providers without regard to technological platforms. The market, however, provides evidence that convergence and competition make application of existing asymmetrical, industry specific regulatory schemes untenable.

Recently, the Commission's Office of Plans and Policy ("OPP") released a study of competition in the Internet backbone market. Michael Kende *The Digital Handshake: Connecting Internet Backbones*, OPP Working Paper No. 32, released September 2000.

The study acknowledges the operation of more than 40 national Internet backbones. *Id.* at 14. Additional reports from OPP regarding deployment of broadband services and Internet transport access have acknowledged the need for the Commission to rethink its regulatory approach and adopt policies that promote regulatory parity and market driven competition. *See* Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper Series No. 29, dated March 1997; Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper Series No. 30, dated August 1998.

With multiple providers of Internet transport and access to ISPs over different technological delivery systems and more than 40 nationwide Internet backbones, there is clearly no basis for the Commission to continue to regulate ILEC broadband services offerings such as DSL as if ILECs are the sole providers of such services. Should the Commission continue to regulate ILEC broadband service offerings, while showing little or no inclination to adopt regulatory parity for functionally equivalent services like Internet transport and access over cable modems and DSL, then consumers will be deprived of the benefits of competition. Moreover, convergence renders application of asymmetrical, industry specific, regulations useless when mergers and acquisitions create companies like AT&T/Media One and WorldCom/UUNET who provide a variety of services over different communications platforms. Equally important is how existing telephone networks are being upgraded to provide broadband Internet transport access and content, which also makes Commission regulation of such companies under industry specific regulations much like fitting a square peg into a round hole. *See* Jason Oxman's *The FCC and the Unregulation of the Internet* at 24 ("The principal challenge for the

future comes from the convergence of technologies, and the growing use of the Internet protocol for the delivery of numerous services traditionally offered over legacy technologies."), Office of Plans and Policy, Federal Communications Commission, OPP Working Paper No. 31, released July 19, 1999.

What is required in today's rapidly changing technological environment is a new regulatory paradigm that is competitively neutral. This proceeding is not the first time that the Commission has raised the issue of regulatory policies that should be symmetrically applied and competitively neutral regardless of technology deployed to provide functionally equivalent services. The questions raised in this proceeding, however, were in fact raised more than three years ago by the Commission in its *Notice of Inquiry* ("NOI") on Section 706. In the initial *NOI* on Section 706, in CC Docket No. 98-146, the Commission acknowledged that its "regulatory system is uneven in its treatment of different technologies."[3] As the Commission explained "statutes and rules contain separate regimes for wireline and wireless, for local and long distance, for telecommunications, broadcasts, and cable television, and so on."[4] According to the Commission, its regulations "may distort the performance of the market to have separate regimes of regulation for competitors in a converging market."[5]

In 1998, Chairman Kennard raised the importance of eliminating burdensome regulations, particularly regarding the disparate treatment of ILECs:

> I want to get rid of any regulations that are not necessary to promote competition or protect consumers.... Much of what

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3 *NOI* at 2,¶4, released August 7, 1998.

4 *Id.*

5 *Id.*

> I have learned recently is in the area of common carrier regulation, and the mass of detailed, often arcane, rules that have accumulated over the years is staggering to me.... I am particularly interested in eliminating barriers to innovation and investment.[6]

The Chairman recognized the importance of ILECs also benefiting from innovations which lead to first-to-market advantages. As the Chairman stated:

> I, for one, am not afraid of seeing wireline telephone providers have a first mover advantage -- if you make the investments to get to market first ....[7]

Market based forces must drive competition. The absence of market driven competition will lead to regulatory delay in deployment of advanced data and Internet networks and services - - delays akin to the multi-billion dollar losses in consumer welfare benefits associated with the deployment of cellular and voice messaging services. The Commission need only open the door to competition by stepping away from burdensome regulatory paradigms that discriminate against carriers on the basis of which Title of the Communications Act of 1934, as amended, their industry happens to fall under. Industry specific regulations in an age of convergence and mergers do nothing more than forestall deployment of critically important technological innovations, increase consumer costs, limit choice, and protect certain competitors from the very competition intended by the Act.

Section 706(a) provides the Commission with an affirmative obligation to encourage the deployment of advanced telecommunications through regulatory forbearance. There is no reference in either Section 706 or Section 10 of the Act, nor any

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[6] Remarks of Chairman Kennard to *USTA's Inside Washington Telecom*, Washington, D.C. (April 27, 1998).

[7] *Id.*

reference in the legislative history of either section, that Congress intended that the forbearance standard in Section 706 is dependent on the requirements for forbearance in Section 10, especially given that the Commission has an affirmative duty to use regulatory forbearance as a tool to remove regulatory barriers to infrastructure investment. Thus, Section 706 provides the Commission with an independent grant of authority to forbear from applying the requirements of the Act when to do so will promote competition and the rapid deployment of advanced telecommunications networks and services.

II. ADVANCE TELECOMMUNICATIONS SERVICES: REGULATORY PARITY FOR EQUIVALENT SERVICES REGARDLESS OF TECHNOLOGICAL PLATFORM

The Commission's *NOI* asks for comment on how cable modem service should be regulated under existing regulatory schemes. The Commission also inquires whether it should forbear from imposing open access requirements on cable operators providing Internet access. In addition, the Commission asks if it should forbear from enforcing disparate, asymmetrical, regulations on other providers of highs-speed Internet access delivered over different technological platforms.

The Commission must eliminate asymmetrical regulatory obligations in competitive markets. Functionally equivalent services should receive the same regulatory treatment regardless of the technological platform used to distribute the service. Competitive services should not be regulated. The Commission should forbear from regulating functionally equivalent competitive services. *See* Section 10 of the 1996 Act, 47 U.S.C. §160, and Section 706. Wireline (*e.g.*, DSL and cable modem) high-

speed broadband transport services provide functionally equivalent services and should not be regulated differently by the Commission.

Functionally equivalent Internet transport services provided over different technological platforms should be free of government regulations. Section 230(b)(1) of the Act states: "It is the policy of the United States - (1) to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. §230(b)(1). Section 230(b)(2) states that the Commission's mission is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §230(b)(2).

Broadband Internet transport is a competitive service. There are multiple technological platforms (*e.g.*, DSL, cable, fixed wireless, satellite) used to transport high-speed broadband data, content, and Internet connections to endusers. *Deployment of Advanced Telecommunication Capability: Second Report at* 6, released August 2000 ("competition is emerging, rapid buildout of necessary infrastructure continues, and extensive investment is pouring into this segment of the economy .... There is no indication that specific types of areas have inadequate access to backbone or *functionally equivalent facilities.*"); *LMDS Order* at 11, ¶23, CC Docket No. 92-297, released June 27, 2000 (" the competitive nature of the broadband market ... the number of consumer broadband options within the various broadband technologies ... together with ... price competition and price reductions in that market, convinces us that incumbent carriers will not be able to ... dominate the market ... [or] cause competitive harm in any market ....").

FCC regulations that discriminate against a particular technological platform that provides functionally equivalent Internet transport services to endusers: (1) stifles competition; (2) investment in deployment of advanced telecommunications capability; (3) is anti-competitive; (4) is protectionist in favor of a given technological platform providing functionally equivalent services; (5) is discriminatory public policy; (6) disserves the public's interest in the benefits of competition and multiple choices of technological platforms providing functionally equivalent services; and (7) is inconsistent with the goals of section 706 (deployment of advanced services to all Americans regardless of the technological platform), Sections 10 and 230(b), and Section 7, 47 U.S.C. §157 ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

Regulation invariably results in the imposition of additional costs on those service providers who are regulated. Regulation may also slow a service provider's ability to respond to changes in the marketplace. The selective imposition of costs and constraints on a service provider's operations unquestionably gives a competing nonregulated, or less regulated, service provider a competitive advantage over its regulated competitor. Such a dichotomy in regulatory treatment can only be justified when it has been clearly demonstrated that regulation is necessary in order to restrain the exercise of market power by the regulated service provider in the relevant service and geographic markets in which it is regulated.[8] The Commission has defined market power as "the ability to raise

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[8] *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 562, ¶13.

and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."[9] Similarly, the 1992 Department of Justice /Federal Trade Commission Merger Guidelines define market power as "the ability profitably to maintain prices above competitive levels for a significant period of time."[10]

The ability to exercise market power by any of the existing service providers in the high-speed data services or broadband Internet access market, as evidenced by the Commission's own analysis (and that of others such as the General Accounting Office), is nonexistent. The proposition that no service provider or technology dominates the high-speed data and Internet services market is unchallenged by credible evidence. It is unfathomable how, on the facts that have been amassed, anyone could conclude that relevant, competitive market factors justify proactive regulatory intervention in this market except as to the application of fundamental common carrier nondiscrimination principles. Specifically, no market or competitive justification exists for the imposition of the onerous and costly regulations that are currently applied to incumbent local exchange carriers serving the high-speed data services market.

Bullish reports and projections by the National Cable Television Association ("NCTA"), in a November 13, 2000 press release, show that cable operators are experiencing high customer growth in the high-speed data services market:

- "According to figures from an NTCA membership survey, the number of new cable modem, cable telephony and digital video subscribers increased markedly during the quarter ending September 30, 2000."

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9 *Id.* at 558, ¶¶ 7-8.

10 *Id.*

- "The nation's major cable operators added approximately 690,000 new high-speed Internet cable modem customers during the 3rd quarter [of 2000]. This brings the number of cable modem customers in the U.S. to 2.95 million."

- At its current pace, U.S. cable companies are expected to sign up 3.6 million cable modem customers by year-end 2000, well over double the year-end 1999 total of 1.6 million."

Although it is reported that domestic DSL service is growing faster than domestic cable modem service, DSL service has yet to surpass cable modem service in consumer penetration. One market research firm predicts that in North America cable modems will maintain their lead into 2002.

High-speed data service over fix wireless and satellite is emerging. Third generation CMRS service will eventually reach American consumers.[11] While cable modem service and DSL lead in consumer penetration among the technologies that allow for the provision of high-speed data service, one can only speculate as to what the positioning in the consumer market will be several years out. There is no reason to handicap any technology or service provider in the high-speed data services market. There is certainly no reason to single out local telephone companies for regulatory treatment that is different from that applied to their competitors in this market. To the extent that high-speed data service is a common carrier service, general prohibitions against discrimination and other unreasonable practices apply. Special obligations such as support for universal service also apply to interstate telecommunications service providers. There is no market or competitive reason to impose other regulatory burdens

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[11] Indeed, Japan's NTT DoCoMo is so bullish on the potential of 3G services that it has invested nearly $10 billion for a 16% stake in AT&T Wireless. *See* Peter S. Goodman, *DoCoMo in Translation*, Washington Post, December 1, 2000, at EO1.

on high-speed data services providers, regardless of the technology employed or the service provider's competitive position in other service or geographic markets.

The Commission's *NOI* asks whether uniform requirements should apply to all providers of high-speed services. *NOI.* at 17, ¶¶ 43-44. USTA supports such an approach which should also include the elimination of the Commission's *Computer Inquiries* and expedited LATA boundary relief for BOCs deploying broadband advanced services. One author urged the Commission to greatly limit the extent to which its actions interfere with the functioning of the Internet services market.[12] Specifically, the Commission is urged to recognize that "Government policy approaches toward the Internet should ... start from two basic principles: avoid unnecessary regulations, and question the applicability of traditional rules."[13] USTA agrees.

III. FCC PUBLIC POLICY FAVORS REGULATORY PARITY FOR FUNCTIONALLY EQUIVALENT SERVICES PROVIDED OVER DIFFERENT TECHNOLOGICAL PLATFORMS

A. LMDS

In the Commission's proceeding on the regulation of Local Multipoint Distribution Services ("LMDS"), the Commission allowed regulations to sunset that had prevented incumbent ILECs and cable operators from owing fixed wireless spectrum in-region. *Third Report and Order and Memorandum Opinion and Order,* CC Docket No.

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[12] *See* Kevin Werbach's *Digital Tornado: The Internet and Telecommunications Policy*, FCC Office of Plans and Policy Working Paper No. 29 (March 1997).

[13] *Id.* at ii.

92-297, released June 27, 2000 ("LMDS Order").[14] As a fixed wireless spectrum, LMDS can be used to provide voice, video, data and Internet access services.

The Commission adopted the *39GHz market test* in eliminating disparate treatment of both incumbent LECs and cable providers who were denied ownership of LMDS licensees in their operating territories. When applying the *39GHz market test* to its LMDS regulations, the Commission asked whether despite substantial market power of incumbent ILECs and cable operators, do FCC ownership restrictions promote competition in those markets and are incumbents likely to cause substantial harm in markets where LMDS is used. *LMDS Order* at 5, ¶7. According to the Commission, "The *39 GHz* test entails examining ... relevant market facts and circumstances: economic incentives, entry barriers, and potential competition." *LMDS Order* at 5, ¶9.

The Commission reached the conclusion that no single broadband technology was dominate. As the Commission reasoned, "The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies – DSL, cable modems, satellite, fixed wireless, and mobile wireless suggest that no group of firms or technology will likely be able to dominate the provision of broadband services." *LMDS Order* at 9, ¶19. "[R]emoval of the eligibility restriction will result in consistent treatment of wireless services." *LMDS Order* at 12, ¶23.

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[14] The Commission originally determined that restricting incumbent cable providers from owning LMDS spectrum in their markets was necessary because cable providers had such market power which the FCC feared would be used in an anti-competitive manner to prevent broadband competition. The Commission, however, did not impose open access provisions on the AT&T/MediaOne merger. *Cf.* Separate subsidiary requirements required by the Commission in the SBC/Ameritech and Bell Atlantic/GTE mergers "to ensure that competing advanced services providers receive effective, nondiscriminatory access to the facilities and services of the merged firm's incumbent LECs that are necessary to provide advanced services." *Deployment of Advanced Telecommunications Capability: Second Repor*t at 97, ¶ 256.

Accordingly, the Commission determined there was "no reason ... to treat LMDS differently from other substitutable spectrum" providing wireless broadband services:

> Satellites, cable modems, xDSL, MMDS spectrum, and optical lasers are other technologies deploying or being market tested to deploy broadband or bundled broadband services. The evidence demonstrates that LMDS ... and other fixed wireless services are virtually indistinguishable not only to consumers, but also in their capability to provide services. *LMDS Order* at 13, ¶26. [O]pen eligibility will likely not pose a significant likelihood of substantial competitive harm in any market. *LMDS Order* at 15, ¶34.

The Commission's *LMDS Order* represents a move in the right direction to bring regulatory parity to how different carriers, providing functionally equivalent services over different technological platforms, should not be regulated. The *39 GHz market test* used by the Commission to determine if ILEC and cable operators should be regulated differently from providers of functionally equivalent Internet transport and data services provides a potential solution to asymmetrical industry specific regulations.

B. Contracts

To promote competition and deployment of advanced telecommunications capabilities and services, the Commission now prohibits carriers in commercial buildings from entering into exclusive contracts. *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57,* released October 25, 2000. The Commission concluded that Section 224 of the Act (regulation of pole attachments) requires utilities and ILECs to provide other carriers and cable service operators reasonable and nondiscriminatory access to conduits and rights-of-ways. In the *Further Notice of Proposed Rulemaking*, the FCC inquires whether the prohibition on exclusive commercial contracts should also apply to residential buildings.

It would appear that the Commission's decision is motivated by the principle of non-discriminatory access for competing providers. If the Commission is compelled to prohibit exclusive contracts in the name of promoting competition for advanced telecommunication services and increased consumer choices, then it would seem logical that the same open access principle applies to a broadband transport platform such as cable plant used to provide Internet access. USTA's argument is consistent with its position that regulatory parity should apply to carriers providing functionally equivalent services regardless of the technological platform used to deliver the service.

IV. DISPARATE TREAMENT

With respect to cable companies, the Commission has adopted voluntary competitive carrier non-discriminatory access commitments for cable modem Internet access service providers. Conversely, the Commission requires ILECs to provide functionally equivalent DSL services on an unbundled basis to competitors. This asymmetrical regulation of functionally equivalent services in the competitive market for Internet transport services is unjustified.

A. AT&T/MediaOne Merger

The Commission concluded that the AT&T/MediaOne merger did not require it to impose mandatory non-discriminatory access requirements, for the benefit of non-affiliated ISPs, as a condition for approving the merger. *Memorandum Opinion and Order*, CS Docket No. 99-251, released June 6, 2000. As explained by the Commission, "Given the nascent condition of the broadband industry and the foregoing promises of competition, we find it premature to conclude that the proposed merger poses a sufficient threat to competition and diversity in the provision of broadband Internet services,

content, applications, or architecture to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree." *AT&T/Media One Order* at 56, ¶123.

The Commission found compelling AT&T/Media One's voluntary commitments to provide non-discriminatory access to non-affiliated ISPs and content providers under the consent decree approved by the Department of Justice. Under the consent decree, AT&T/MediaOne agrees: (1) to divest Road Runner interests by 12.31.2001; and (2) for 2 years after divestiture of Road Runner, not to create broadband agreements with AOL/Time Warner "that proposes joint provision of a residential broadband service or any agreement that would prevent either party from offering a residential broadband service to customers in any geographic region." *AT&T/Media One Order* at 56, ¶122.

The Commission further reasoned that imposing non-discriminatory access obligations on the combined AT&T/MediaOne cable facilities that would benefit non-affiliated ISPs and content providers was unnecessary: "We also decline to impose an "open/forced access" requirement on the merged firm's cable systems as a condition of this merger based on arguments regarding alleged disparate regulatory treatment of cable operators and telephone companies offering broadband Internet access. As we noted in our *Amicus Brief* to the U.S. Court of Appeals for the Ninth Circuit, the Commission has not determined whether Internet access via cable system facilities should be classified as a "cable service" subject to Title VI of the Act, or as a "telecommunications" or

"information service" subject to Title II." *AT&T/Media One Order* at 57, ¶126.[15] Certainly, non-discriminatory access by non-affiliated ISPs and content providers to cable facilities is not dependent on the ultimate classification of the Internet transport service offered over cable modems by cable operators.

After the Commission granted approval of the merger, AT&T/MediaOne pursued efforts before Congress to remove the 30% nationwide coverage cap for cable programming which potentially expands AT&T's broadband transport capabilities. The efforts of AT&T/MediaOne are not unexpected because the company is under no legally enforceable obligation to provide non-discriminatory access to its cable facilities to non-affiliated ISPs or content providers. In addition, the single source franchise monopoly granted cable operators eliminates competition. Moreover, consolidation of the cable industry, absent non-discriminatory access, increases the likelihood that non-discriminatory access by non-affiliated ISP and content providers to cable system facilities operated by AT&T/MediaOne and similarly situated MSOs with nationwide operations will remain little more than an unfulfilled promise.

B. AOL/Time Warner Merger

The AOL/Time Warner merger presents similar issues as the AT&T/MediaOne merger with potentially even greater impacts. *See* CS Docket No. 00-30. If the history of the AT&T/Media One merger is a guide, then the Commission is likely to rely on voluntary commitments of promises of non-discriminatory access to non-affiliated ISPs

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[15] As explained in the Petition, and USTA's written *ex parte* to Chairman Kennard dated November 29, 2000, cable broadband transmission service offered by cable operators over cable systems as part of their Internet access offerings is a telecommunications service. Accordingly, cable operators providing telecommunications services must contribute to the universal service fund. *See* Part VI of this filing.

to AOL/TimeWarner cable systems. *See* Statements of AOL's Steve Case and TimeWarner's Gerald Levin, FCC *En Banc* Hearing, June 27, 2000.

C. DSL Sevices Regulated as UNE

The Commission argues that functionally equivalent DSL broadband ILEC services must be subject to mandatory open access, *i.e.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos., 98-147, 98-11, 98-26, 98-78, released December 23, 1999, 15 FCC Rcd 385 (1999), *appeal pending*, *MCI/WorldCom v. FCC*, Case No. 00-1002 (D.C. Circuit), even though various Commission orders and reports have determined that Internet backbone and transport is a competitive service.

The Commission regulates ILEC DSL transport services for data and Internet traffic as telephone exchange or exchange access subject to unbundling obligations of Section 251. ILEC are also required to provide line sharing to facilitate broadband competition even though the market for broadband Internet transport is competitive. *Deployment of Wireline Services offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147and 96-98, released December 9, 1999, *appealed USTA v. FCC*, No 00-1012 (D.C. Circuit 2000).

ILEC DSL services and cable modem services are functionally equivalent services provided by carriers which have historically been regulated under different provisions of the Communications Act of 1934, as amended. The Commission chooses to adopt a hands-off policy for cable modem Internet access, while burdening ILEC DSL Internet access services with regulations that stifle competition. It is time for the

Commission to recognize that functionally equivalent services should receive the same non-discriminatory, competitively neutral, regulatory treatment.

D. General Accounting Office ("GAO") Report

In a recent report to Congress, the GAO recognized the need for a fundamental regulatory change in how functionally equivalent services are regulated by the Commission. *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers, Report to the Subcommittee on Anti-trust, Business Rights and Competition, Committee on the Judiciary, U.S. Senate,* released October 2000 ("GAO Report")(the report focuses on residential consumers' Internet use, though the majority of Internet traffic consists of business use).

Consumers who use the telephone network have more choices for transport to the Internet and access to ISPs than users of cable or wireless transport who are limited to a single transport option and the ISP is generally affiliated with the transport provider. *GAO Report* at 22. However, as the GAO explains "[E]ven with passage of the Telecommunications Act of 1996, communications law retains a "stovepiped" – or compartmentalized – structure under which each traditional communications service is governed by particular laws." *GAO Report* at 7. According to the GAO, "The capability of several networks to provide consumers with an identical service – physical transport to the Internet- has resulted in a regulatory conundrum. Should the various communications providers be held to the same rules when providing the same service?" *GAO Report* at 33.

The GAO acknowledges that "As the lines between providers and services continue to blur, policymakers may increasingly face challenges ... in how functionally

similar services are governed over different networks." *GAO Report* at 34. The GAO argues that a different course of action should be pursued to address the problem of regulations that treat functionally equivalent services differently because of the technological platform upon which the service is provided. As the GAO explains: "In light of the convergence occurring in the communications market and the disparate regulatory treatment of functionally equivalent services provided over different networks, the Congress may wish to consider whether statutory or regulatory action is needed at this time. For example, "amending the Communications Act ... to ensure that both existing and emerging services provided over different networks are regulated in a comparable manner ...." or "direct [the] FCC to convene a public-private advisory committee or working group to develop recommendations on the appropriate regulation of existing and emerging services that are functionally similar but provided over different networks." *GAO Report* at 35.

The *GAO Report* presents a compelling case why the Commission should exercise its existing authority under Sections 10, and 706 of the Act to adopt regulatory policies that promote competition by eliminating industry specific regulations for companies in different market segments that provide functionally equivalent services. This approach would benefit consumers by allowing market forces to drive competition.

V. NECESSARY AND IMPAIR

The Supreme Court's decision in *AT&T v. Iowa.*[16] instructed the Commission to apply the necessary and impair standards of Section 251(d)(2) in its review of ILEC unbundling obligations in Section 251 (c)(3). According to the Court, the Commission

[16] 119 S.Ct. 721 (1999).

must "determine on a rational basis *which* network elements must be made available, taking into account the objectives of the 1996 Act and giving some substance to the 'necessary' and 'impair' requirements"[17] Consistent with the Court's necessary and impair analysis, Commission regulation of ILEC DSL Internet access services and imposition of line sharing obligations are unnecessary and inconsistent with the Court's mandate.

VI. THE COMMISSION SHOULD GRANT USTA's PETITION AND CLARIFY THE OBLIGATION TO CONTRIBUTE TO UNIVERSAL SERVICE

USTA's Petition seeks regulatory parity by requesting the Commission to declare that "cable operators or their affiliates that provide telecommunications services are required to contribute to universal service pursuant to Section 254(d) of the ... Act and the Commission's regulations." *Petition* at 1. Consistent with the Ninth Circuit's analysis in *City of Portland* that broadband transmission services provided by cable operators over cable systems are telecommunications services, then Section 254(d) of the Act obligates them, as telecommunications carriers providing interstate telecommunications services, to contribute to universal service like other carriers.

In a written *ex parte* to Chairman Kennard dated November 29, 2000, USTA urged the Commission to issue a ruling on the Petition by December 15. As USTA explained, Cox Communications ("Cox") recently announced that it will stop paying local cable franchising fees for its high-speed data services offered over its cable systems in 15 locations in California. *USTA Ex parte* at 1. Cox's apparent reasoning is that

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[17] *Id.* at 736.

consistent with the decision in *City of Portland,* its cable modem data and Internet services are telecommunications service beyond the reach of local cable regulators. Conversely, Cox has not demonstrated any intent to make payments to the universal service fund as required under Section 254(d) of the Act. *USTA Ex parte* at 2. In addition, AT&T is reportedly contemplating the same approach adopted by Cox.. *Id.*

Clearly, the Commission "should not allow such "gaming of federal and local regulation by cable operators." *USTA Ex parte* at 2. As USTA explained: "The Act requires all interstate telecommunications carriers that offer interstate telecommunications service to contribute to universal service, with extremely narrow exceptions.... All such carriers share the obligation to contribute, without regard to the technology used to provide the service.... If some carriers do not contribute to universal service, the obligation becomes greater for those that do." *Id.* at 2-3.

CONCLUSION

Functionally equivalent services should receive the same regulatory treatment. The technological platform used by a particular carrier should not lead to disparate regulatory treatment. Disparate regulatory treatment creates market advantages in favor of cable modem Internet access services which the 1996 Act never intended. Because the Commission has chosen not to regulate cable modem transport services, as compared with the unprecedented regulation of ILEC broadband DSL services and the obligation to provide line sharing even though broadband Internet transport and access is a competitive service, this policy distorts the market. The *GAO Report* makes clear, consumers have more choices when they use telephone lines for Internet transport, then they do if they use cable modem transport to the Internet. As the *GAO Report* concluded,

consumers are likely to have but one Internet transport option when using cable modem services and the ISP content provider is likely to be an affiliated partner of the cable carrier Internet transport provider. The Commission, however, concludes that it is unnecessary to ensure non-discriminatory access by non-affiliated ISPs and content providers to cable facilities.

USTA is not requesting that the Commission impose more regulations upon providers of functionally equivalent services delivered over different technological platforms. Instead, USTA argues that the Commission can promote competition, which benefits end-users, by forbearing from imposing regulations that penalize ILECs while providing market advantages to cable and other providers of Internet transport. The *LMDS Order* took exactly this approach when it allowed regulations that penalized incumbent ILEC and cable operators from owning LMDS broadband spectrum in-region to sunset. Competitive services like Internet transport services should not be unregulated. The Commission's *Computer Inquires* are no longer valid. BOC LATA boundary relief should be expedited.

USTA urges the Commission to recognize that the benefits to consumers derived from regulatory forbearance and market-based decision making cannot be matched by government regulations in a rapidly changing technological environment. Industry-specific regulations serve as disincentives to the deployment of advanced telecommunications networks, delay the availability of innovative products and services, limit consumer choices, while increasing the costs for services that are available. Enforcement by the Commission of asymmetrical regulations is inconsistent with rapidly changing market conditions.

The requirement that *all* providers of telecommunications services contribute to the universal service fund is clear. USTA's Petition and written *ex parte* highlight the need for the Commission to rule by December 15 that cable operators who provide telecommunications services are required to contribute to the universal service fund. The Act does not permit cable operators, who provide telecommunications services, to use the decision in *City of Portland* to avoid the payment of local franchise fees, while also appearing to skirt their responsibility to contribute to the universal service fund.

Respectfully submitted,

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December 1, 2000

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CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on December 1, 2000 a copy of *Comments of the United States Telecom Association,* in CC Docket No. 00-185, was hand-delivered to the persons on the attached service list.

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